Supreme Court, U.S.
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No. 90-1225

In The

Supreme Court of the United States

October Term, 1990

JOE AULSTON and LOLA AULSTON; HOWARD L. BARTLEY and ELSIE BARTLEY; VIRGINIA BASSETT; ROGER A. BIGLER, Trustee; et al.;

Petitioners,

vs.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; MANUEL LUJAN, JR., in his official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; CY JAMISON, in his official capacity as Director of the U.S. Bureau of Land Management; H. ROBERT MOORE, in his official capacity as Colorado State Director of the Bureau of Land Management,

Respondents,

and

SHELL WESTERN E & P, INC.; CONOCO, INC.; VINCENT J. DUNCAN; RAYMOND T. DUNCAN; ELECTRA INVESTMENT; SYNERGY EXPLORATION, CO.; GULF OIL CORP.; MOBIL PRODUCING TEXAS/ NEW MEXICO; UMC PETROLEUM CORP.; ESTATE OF WALTER DUNCAN; TIDELANDS ENERGY CO.; UNIVERSAL RESOURCES CORP.; LENDON CO.; DUNCAN ENTERPRISES, INC.; JUSTIN R. MEYER; BARBARA L. MEYER; PHILLIPS PETROLEUM CO.,

Intervenors-Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE INTERVENORS-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In construing the word "gas" as used in the Agricultural Entry Act of 1914, may the court give deference to the Interior Department's consistent and long-standing interpretation?

2. Even if the court were precluded from giving weight to the Department's interpretation is it nonetheless correct that a reservation of "gas" under the Agricultural Entry Act of 1914 includes noncombustible gases such as carbon dioxide?

LIST OF PARTIES PURSUANT TO RULE 29.1

Shell Western E & P, Inc.

Parent: Shell Energy Resources Inc.; Shell Oil Co.; Royal Dutch Petroleum/Shell Transport & Trading Co.

Subsidiaries: Belridge Farms; Belridge Packing Co.; Choctaw Pipe Line Co.; Mabee Petroleum; Shell Michigan Pipeline Co.; SWEPI Royalties Inc.; Shell Cortez Pipeline Co. (partially owned subsidiary: Cortez Capital Corp.); (affiliates: Shell Western Pipelines Inc.; East Texas Salt Water Disposal Co.; Grande Ecallie Land Co., Inc.); Van Salt Water Disposal Co.; Wyoming Industrial Development Corp.

Conoco, Inc.

Parent: E.I. Dupont De NeMours and Company

Subsidiaries, excluding wholly owned subidiaries: Big Sky Montana Realty, Inc.; Cit-Con-Oil Corporation; Conch International Methane Ltd.; Du Pont Scandanavia AB; ARA Gavle AB; ARA Jonkoping AB; Drivmedeiscentvalen; Maxi Benson AB; Howson-Algraphy Aktiebolag; ACE Limited; A.C.E. Insurance Company (Bermuda) Ltd; A.C.E. Insurance Company Ltd; Conoco Cumi Cumi Limited; Conoco Dabaa Ltd.; Conoco El Hamma (Tunisia) Ltd.; Conoco Faghur Ltd; Conoco Iraq Ltd.; Conoco Kayes (Congo Ltd.); Conoco N'dombo (Gabon) Ltd.; Conoco North Ras Qattara Ltd.; Conoco North Sitra Ltd.; Conoco Oriente Ltd; Conoco Peru Ltd.; Conoco Warim Ltd.; Conoco West Ras Qattara Ltd.; Conoco Yemen (Aden) Ltd.; Conoco Yemen (Sanaa) Ltd.; EXEL Limited; X.L. Insurance Company Ltd.; Oil Insurance Ltd.; Conoco Onango (Gabon) Ltd.; Conoco South Umbarka Ltd.; Conoco Spain Ltd.; OK Coop A.G.; T.A.L.;

LIST OF PARTIES PURSUANT TO RULE 29.1 – Continued

Conoco Arabia Limited; Conoco Buton Ltd.; Conoco Cabinda (Angola) Ltd.; Conoco Cegonha (Angola) Ltd.; Louisiana Carbon Company; Nelson Industrial Steam Company (NISCO); Oberrheinische Mineraloelwerke GmbH (A/K/A OMW); Petco Enterprises Ltd.; Petrocokes, Ltd; Phoenix Park Gas Processors, Ltd; Iranian Investment Corporations; Iranian Oil Participants Ltd.; Iranian Oil Services (Holding) LTD; Iricon Agency, Ltd; The Standard Shale Products Company; Tidelands Royalty Trust; Venture Coke Company; Oasis Oil Company of Libya, Inc.; Societe de Financement Dela Route Tahoua 'Arlit; Cure Inc.; Felix Oil Company; Jupiter Chemicals, Inc.; Kettleman North Dome Association; Marine Preservation Association; CSPI BWN; Hydroflow Technologies, Ltd; Tongue River Holdings, Inc.; Tongue River Railroad; Ameropa Coal Trading and Shipping, Inc.; Conco North Ras Qattara Ltd.; K/S Statfjord Transport A.S. & Co.; Statfjord Transport A.S.; Colonial Pipeline Company; Continental Alaska Pipe Line Company; Milne Point Pipe Line Company; Dixie Pipeline Company; Explorer Pipeline Company; Heartland Pipeline Company; Joliet Pipeline Company; Lake Charles Pipe Line Company; Pioneer Investments Corporation; Pioneer Pipe Line Co.; Salt Lake Terminal Co.; Platte Pipe Line Company; Razorback Pipeline Company; Yellowstone Pipe Line Company; Khalda Petroleum Company; Etzel Gas Lager Project; JET Tankstellen-Betriebs-GmbH; Societue du Pipeline Sud-Eoropean SA; Suedbitumen GmbH.

LIST OF PARTIES PURSUANT TO RULE 29.1 – Continued

Vincent J. Duncan
Raymond T. Duncan
Duncan Enterprises, Inc.
Affiliate: Energy Partners Nominee Co.
Estate of Walter Duncan
Electra Investment
Synergy Exploration, Co.
Gulf Oil Corp. (purchased by Chevron U.S.A., Inc.)
Parent: Chevron Corp.
Subsidiaries of Chevron U.S.A., Inc.: American Personnel Services Inc.; Atlas Supply Co. (25% owned); Bolivian Gulf Oil Co.; The California Co.; Chevron Capital USA Inc.; Chevron Geothermal Co. of Cal.; Chevron Oil Finance Co.; Chevron Petroleum Co. of the Netherlands; Chevron Travel Club, Inc.; Federal Engineering Corp.; Felix Oil Co. (30.7% owned); Gulf Auto Club, Inc.; Gulf Oil Communications Co., Inc.; Gulf Oil Realty Co.; GOC Acquisition Corp.; Intermountain Geothermal Co.; International Bitumen Emulsions Corp.; Kewanee Industries, Inc.; Lost Hills Water Co.; Murvale Co.; Pembroke Capital Co., Inc. (50% owned); Petroleum Facilities, Inc.; Standard Gasoline Co.; Standard Oil Co.; Standard Oil Co. of Texas, Inc.; Transocean Group, Inc.; Warren Petroleum, Inc.; Western States Geothermal Co.

Mobil Producing Texas/New Mexico, Inc.
Parent: Mobil Corp.
Justin R. and Barbara L. Meyer
Tidelands Energy Co., Ltd.
Universal Resources Corp.

LIST OF PARTIES PURSUANT TO RULE 29.1 – Continued

Parent: Questar

Lendon Co.

Parent: Leonard Minerals Co.

*Phillips Petroleum Co.**

Subsidiary: Phillips Oil Co.

UMC Petroleum Corp. (formerly, MCO Resources, Inc.)

Subsidiaries: Silver Eagle Resources, Ltd.; MCR Geothermal Corp.; Big Chief Drilling Co. (subsidiary: Comet Drilling Co.); Reserve Oil & Gas Co.; UMC Pipeline Corp.; United Meridian International Corp.; I.E.I. Exploration Inc.

The following were interested parties in the proceeding before the Interior Board of Land Appeals, but did not move to intervene in the action filed in the Federal District Court:

Donald B. Anderson Ltd.

ARCO Oil & Gas Co. (division of Atlantic Richfield Co.)

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* Phillips Oil Co. assigned their interest to Phillips Petroleum Co. during the course of this litigation.

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ADDITIONAL STATUTORY PROVISIONS IN CASE
(Not Reproduced by Petitioners)

The Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181-287 (1988)), reads in part:

> Deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite (including all vein-type solid hydrocarbons), or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereafter provided, shall be subject to disposition in the form and manner provided by this chapter to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter.
>
> The term "oil" shall embrace all nongaseous hydrocarbon substances other than those substances leasable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons).
>
> The term "combined hydrocarbon lease" shall refer to a lease issued in a special tar sand

area pursuant to section 226 of this title after November 16, 1981.

The term "special tar sand area" means (1) an area designated by the Secretary of the Interior's orders of November 20, 1980 (45 FR 76800-76801) and January 21, 1981 (46 FR 6077-6078) as containing substantial deposits of tar sand.

The United States reserves the ownership of and the right to extract helium from all gas produced from lands leased or otherwise granted under the provision of this chapter, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further,* That in the extraction of helium from gas produced from such lands it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof.

STATEMENT OF THE CASE

Intervenors-respondents are lessees of one or more federal oil and gas leases issued by the United States under the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181-287 (1988)) ("1920 Mineral Leasing Act") that cover lands now included in the McElmo Dome Unit. Petitioners claim ownership of these lands under patents that reserve "oil and gas" or "oil, gas, potash and sodium" to the United States as provided in the Agricultural Entry Act of 1914, ch. 142, 38 Stat. 509 (codified as amended at 30 U.S.C. §§ 121-125 (1988)) ("Agricultural Entry Act").[1]

[1] Because the Bureau of Land Management, the Interior Board of Land Appeals, the District Court and the Court of

(Continued on following page)

Petitioners also claim ownership of all carbon dioxide gas underlying these lands on the theory that the reservations of "gas" to the United States are too narrow to include noncombustible gases.

As early as 1950, carbon dioxide gas was discovered and produced from a federal oil and gas lease covering land now included in the McElmo Dome Unit, and was used to make dry ice. Int.-Resp. App. 17a-18a n.1.[2] Pet. App. 47a n.2. During the 1970s, two of the intervenors-respondents, Shell and Mobil, formed seven separate federal units to explore further for carbon dioxide gas. *Id.* The acreage covered by these seven units was ultimately combined to form the McElmo Dome Unit, which is operated by Shell. *Id.* Approximately 242 federal oil and gas leases are included in the Unit, at least 115 of which are directly affected by petitioners' claims. Int.-Resp. App. 17a-18a n.1.

The McElmo Dome Unit is a producing oil and gas unit formed under the authority of the 1920 Mineral

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(Continued from previous page)

Appeals have all rejected petitioners' argument that the term "gas" does not include carbon dioxide gas, petitioners have not yet had to prove their ownership of the patented interests. It will be assumed for purposes of this brief, however, that petitioners are, in fact, successors in interest to the original patentees.

[2] Petitioners' Statement of the Case does not include reference to the decision of the BLM, dated December 17, 1984, that was appealed to the Interior Board of Land Appeals and resulted in the *Robert D. Lanier* decision set forth at Pet. App. 45a-63a. A copy of the BLM decision is included here as Appendix A (Int.-Resp. App. 1a-24a).

Leasing Act and approved by the Department of the Interior ("Department"), Bureau of Land Management ("BLM") and the Colorado Oil and Gas Conservation Commission effective April 1, 1983. Int.-Resp. App. 17a-18a n.1, 21a n.14. The primary purpose of the Unit is to extract gas from the Mississippian Leadville Formation underlying the Unit. Int.-Resp. App. 17a-18a n.1; Pet. App. 47a n.2. This gas deposit was expressly found by the Department to be "a naturally formed gas indigenous to the underlying reservoir consisting of several commingled components". Pet. App. 60a n.11. Those components include carbon dioxide gas (99%), nitrogen gas (0.9%) and methane gas (0.1%).[3]

Though painted with petitioners' brush, petitioners' Statement of the Case (Pet. 3-6) is an adequate statement of the procedural history of this dispute in most

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[3] Subsequent information regarding the composition of the McElmo Dome gas stream indicates that the percentage of carbon dioxide gas is slightly less than 99%, and the percentage of hydrocarbons is slightly greater than 0.1%. Small, but marketable, amounts of oil are also present. Intervenors-respondents agree with the Court of Appeals that petitioners' "purity test" is unworkable as a rule of mineral conveyancing and that, consequently, the precise composition of the gas stream is irrelevant. Petitioners, however, continue to stress the "purity" of the McElmo Dome gas and continue to raise their "purity test" argument. Pet. 22. If this Court were to grant petitioners' request for review and ultimately accept petitioners' argument that the ratio of hydrocarbon to non-hydrocarbon gases is determinative of whether a particular gas deposit is "gas" for purposes of a mineral reservation, the matter would need to be remanded to the agency for a full factual and technical hearing on the characteristics and composition of the reservoir and gas stream.

important respects.[4] Petitioners' characterization of the Court of Appeals' opinion, however, is not accurate. Pet. 6. As discussed in Part I below, the Court of Appeals did note that the Interior Department had no occasion, prior to the inception of this dispute, to determine *explicitly* whether carbon dioxide is "gas" within the meaning of the Agricultural Entry Act. The court concluded, however, that the Department had a long-standing, publicly-held interpretation of "gas" as used in contemporaneous and interrelated legislation that is to be construed *in pari materia* with the Agricultural Entry Act. Petitioners' statement that the Court of Appeals rejected their argument regarding contemporaneous agency interpretation "without discussion" (Pet. 6) is also incorrect. See Pet. App. 24a-25a.[5]

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[4] Petitioners assert in their Statement of the Case (and again at Pet. 12, n.6) that the carbon dioxide gas in issue is valued at more than $500 million. Because this alleged fact is irrelevant to the issue of gas ownership, intervenors-respondents do not consider the statement significant. It should be noted, however, that this alleged fact is not within the administrative record. Elsewhere, petitioners imply that more than 5.5 million acres of land are affected by the Court of Appeals' judgment. Pet. 9, 23. This alleged fact is likewise irrelevant to ownership and outside the administrative record.

[5] The opinion of the Court of Appeals for the Tenth Circuit is reproduced in petitioners' Appendix A, Pet. App. 1a-39a. In reviewing the Appendix, we noted a typographical error at Pet. App. 21a, line 12. The text should read "More significantly, the 1914 Act itself incorporated ***none*** of the language employed in the letters and documents to which plaintiffs cite." We bring this error to the Court's attention because the sentence is a significant one.

WHY THE WRIT SHOULD BE DENIED

Petitioners fail to demonstrate that the judgment of the Tenth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. *See* Sup. Ct. R. 10.1(a). Each of the arguments raised by petitioners in their request for a writ of certiorari was addressed by the Court of Appeals in a lengthy and exhaustive opinion that employed a thorough and careful analysis consistent with the dictates of this Court. Further review is, therefore, unnecessary.

The Tenth Circuit Court of Appeals upheld the Department's determination that the word "gas" as used in the Agricultural Entry Act is broad enough to include combustible gases, such as methane, and noncombustible gases, such as the carbon dioxide gas in issue. Petitioners' novel argument for review by this Court – that the Court of Appeals erred in giving "retroactive deference" to the Department's 1986 interpretation of the Agricultural Entry Act – mischaracterizes the court's opinion. Petitioners' argument assumes that the interpretation of "gas" set forth in the *Lanier* decision (*Robert D. Lanier*, 93 I.D. 66, 90 IBLA 293 (1986), reproduced at Pet. App. 45a-63a) is an entirely new agency interpretation and that it is being shown "retroactive deference" in a manner that divests petitioners of their previously held title to noncombustible gases.

This is simple bootstrapping. The Court of Appeals expressly concluded that the Department's interpretation of "gas" in *Lanier* is not new; it tracks the Department's long-standing and publicly-held interpretation of the

word "gas" in contemporaneous and interrelated legislation. Pet. App. 27a-29a, 22a-23a n.13. Though petitioners may disagree with this conclusion, they fail to challenge it directly. Instead, petitioners beg the question entirely by first ignoring the court's finding and then attacking the court for deferring to a new interpretation of gas that "retroactively" strips petitioners of their vested rights.

Also built into petitioners' "retroactive deference" argument is the inference that the Department's interpretation of the word "gas" set forth in *Lanier* is not only new, but effects a change from the past that divests petitioners of title to the carbon dioxide gas. Thus, petitioners assume their own ultimate conclusion of ownership in order to portray the effects of the Department's interpretation as "retroactive". Again, however, the Court of Appeals expressly and systematically rejected each and every argument made by petitioners that the text of the Agricultural Entry Act, its legislative history, or prior Department interpretations of "gas" operated in the past to place title to carbon dioxide gas in petitioners.

The Court of Appeals was not required to construe the Agricultural Entry Act in isolation, without giving consideration to long-standing agency interpretation in related legislation and without regard to broader policies such as the rational management and disposition of the public lands. The best that can be said from petitioners' point of view is that prior to *Lanier*, the Department had not had specific occasion to apply its consistent and long-standing interpretation of gas to the precise issue of whether the reservations of gas in petitioners' patents cover carbon dioxide gas. In this narrow sense, the Department was faced with a case of first impression.

Neither the Department's interpretation of "gas" nor the Court of Appeals' deference to it, however, is "retroactive" simply because the specific circumstances of *Lanier* had not been addressed before. A consistent and long-standing interpretation of gas in the general context of public lands leasing and disposition had been established. In *Lanier*, the Department did not depart from that consistent and long-standing interpretation. Rather, the Department adhered to its long-standing interpretation by applying the principles underlying that interpretation to the specific issues raised. If this is retroactive agency interpretation or "retroactive deference" to agency interpretation, so is every other instance where an agency applies a general interpretation or policy to a specific situation and the courts give weight to the agency's judgment.

Finally, as demonstrated in Part II below, even if no deference whatsoever were owed to the Department's long-standing interpretation of "gas" and the task before the Court of Appeals was to ascertain the "correct" meaning of the Agricultural Entry Act, it is clear from the court's opinion that the word "gas" should be construed in a manner broad enough to encompass both combustible and noncombustible gases.

I. THE COURT OF APPEALS PAID PROPER DEFERENCE TO THE DEPARTMENT'S INTERPRETATION OF THE WORD "GAS".

A. Petitioners' "Retroactive Deference" Argument Incorrectly Portrays the Interpretation of the Department in *Lanier* as an Isolated Instance and Portrays the Deference Shown by the Court of Appeals as Based Solely on That Instance.

The deference paid to the Department by the Court of Appeals was not based solely upon the specific

interpretation of "gas" applied by the Department in the 1986 *Lanier* decision. The court's willingness to uphold the Department was based, instead, upon a finding that the Department's specific interpretation of "gas" in *Lanier* is consistent with its long-standing and publicly-held interpretation of "gas" in contemporaneous legislation so closely related to the Agricultural Entry Act as to make deference appropriate. Pet. App. 27a-29a.

The Court of Appeals carefully reviewed the Agricultural Entry Act, together with the broader statutory scheme governing management and disposition of public lands of which the Agricultural Entry Act is a part. In the course of its review, the court concluded: (i) that the Agricultural Entry Act and the 1920 Mineral Leasing Act are substantially contemporaneous and interrelated statutes (Pet. App. 21a-22a, 27a-29a); (ii) the word "gas" in the Agricultural Entry Act and the 1920 Mineral Leasing Act should be construed *in pari materia*[6] (Pet. App. 17a n.11, 22a, 22a-23a n.13, 28a); and (iii) the word "gas" used in the 1920 Mineral Leasing Act includes both combustible and noncombustible gases (Pet. App. 22a, 22a-23a n.13).

Given the historic and functional relationship between the Agricultural Entry Act and the 1920 Mineral

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[6] The Court of Appeals also noted that "gas" as used in a related 1922 statute governing Alaska patents is, likewise, broad enough to include noncombustible gases and further concluded that the most rational reading of the Agricultural Entry Act, the 1920 Mineral Leasing Act and the 1922 statute is that Congress intended "gas" to mean the same thing in all three statutes. Pet. App. 22a-23a n.13, 27a-29a.

Leasing Act[7] and need for construing "gas" in both statutes *in pari materia*, the Court of Appeals properly concluded that the Department's interpretation of the word "gas" under Section 181 of the 1920 Mineral Leasing Act is entitled to some deference – particularly where, as here, the interpretation is one of long-standing, is publicly-held and is fully consistent with the specific application made by the Department in *Lanier*. Pet. App. 29a.[8]

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[7] There is also an added historic and functional connection between these two statutes. It appears that the pre-patent classification of petitioners' lands as valuable for oil and gas was based upon permits to prospect for oil and gas issued under the 1920 Mineral Leasing Act. Thus the "gas" for which petitioners' lands were classified as valuable was "gas" as that word is used in the 1920 Mineral Leasing Act. This further supports the Department's interpretation and the court's conclusion that the word "gas" in the Agricultural Entry Act should be construed *in pari materia* with the 1920 Mineral Leasing Act. Pet. App. 17a n.11.

[8] In addition, the Court of Appeals noted numerous other contemporaneous Department communications indicating that the Department interpreted "gas" broadly enough to include both combustible and noncombustible gas. For example, in 1915, years before any of petitioners' patents were issued and decades before intervenors developed the carbon dioxide gas in the McElmo Dome Field, a Department bulletin was published characterizing a gas stream comprised *ninety-one percent* of carbon dioxide gas as "natural gas". Pet. App. 25a. Another 1913 Department bulletin shows that gas in the Department's view meant fuel gas for the most part, but not *only* fuel gas. Pet. App. 24a. Yet another 1911 Department bulletin indicates the Department was well aware that gas fields in California contained significant nonhydrocarbon constituents. Pet. App. 19a n.12.

B. Petitioners' "Retroactive Deference" Argument Ignores the Express Findings and Analyses of the Court of Appeals and Assumes Its Own Conclusion.

Petitioners seek this Court's review on the basis that the Court of Appeals has adopted a new and dangerous methodology of "retroactive deference". Though couched in these confusing terms, petitioners' argument boils down to a claim that the Court of Appeals has permitted the Department to change its interpretation and apply it retroactively in a manner that divests petitioners of previously vested interests in carbon dioxide gas. This argument is in turn based upon two faulty premises: the first premise – that the Department's interpretation of "gas" applied in *Lanier* is a new interpretation that changes preexisting Department policy – ignores the Court of Appeals' express findings that *Lanier* is consistent with the Department's long-standing interpretation of "gas"; the second premise – that the decision in *Lanier* operates to divest petitioners of title to carbon dioxide gas – begs the question entirely by assuming that, absent *Lanier*, patents reserving gas to the government reserve only combustible gases.

It is clear from its opinion that the Court of Appeals did not view the Department's decision in *Lanier* as establishing a new interpretation of gas or departing from prior Department practices. Rather, *Lanier* represents a specific application by the Department of its long-standing and publicly-held view of what the word "gas" means when used in oil and gas leases, oil and gas permits and other conveyancing contexts relating to the public lands administered by the Department.

Similarly, the Court of Appeals found nothing in the text of the Agricultural Entry Act, its legislative history or any statements, actions or policies of the Department that, absent *Lanier*, would permit petitioners to lay claim to carbon dioxide gas or any other gas. Petitioners' argument against "retroactive deference" to the Department's interpretation of "gas" might have merit if, at the time petitioners' patents were issued, the Department had held a consistent and long-standing interpretation of the word "gas" to mean combustible gases *only* and petitioners had relied to their detriment on that interpretation. Such is not the case, however. The issue of how much deference, if any, should be paid to a flip-flopping agency interpretation of the word "gas" was not before the Court of Appeals; and petitioners cannot presume that the court would give the same weight to an ever-changing and conflicting Departmental interpretation that it gives to a consistent and long-standing interpretation.[9]

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[9] The Department itself recognizes limits on its ability to change its interpretations and policies abruptly and apply them retroactively – limits designed to protect vested rights and preclude the spectre of "badminton" title raised by petitioners. *See Sun Exploration & Production Co.*, 112 IBLA 373 (January 19, 1990) (Department may give a new interpretation of a regulation retroactive application only if: the party affected by the retroactive application has not relied to its detriment on the previous interpretation; the Department has not acquiesced in the conduct required of the party under the old interpretation; the new procedure is an attempt to fill a void in an unsettled area of the law, and not an abrupt departure from a well-established practice; and the prejudice to the

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C. Petitioners' "Retroactive Deference" Argument Marks a Reversal of Petitioners' Position Before the Court of Appeals.

While petitioners don't so state directly, their "retroactive deference" argument also implies that the Department's long-standing interpretation of "gas" in contemporaneous and interrelated legislation is irrelevant to construction of the Agricultural Entry Act. The corollary implication is, of course, that only Department interpretations dealing *specifically* with "gas" as used in the Agricultural Entry Act should have been considered by the Court of Appeals. This marks a reversal from petitioners' prior position. Petitioners argued extensively before the Court of Appeals that the Department's interpretation favored petitioners' construction of the Agricultural Entry Act. In making that argument, petitioners cited freely to Department bulletins, correspondence and regulations, both old and new, that do not purport to interpret "gas" specifically as it is used in the Agricultural Entry Act. Moreover, petitioners expressly

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affected party substantially outweighs the statutory interest and purposes sought to be protected). *Accord Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971); *NLRB v. Bufco Corp.*, 899 F.2d 608, 612 (7th Cir. 1990); *Runnells v. Andrus*, 484 F. Supp. 1234, 1238 (D. Utah 1980). It was unnecessary for the Court of appeals to discuss these limitations, however, because the court found no inconsistencies in the Department's interpretation of "gas" in the nearly 80 years that the Department has been administering the lands affected by the Agricultural Entry Act. Moreover, it was intervenors-respondents, not petitioners, who invested substantial time and capital developing the gas in reliance on the Department's interpretation.

acknowledged the relevance of the Department's interpretation of contemporaneous statutes. Pet. 10th Cir. Opening Brief 38-43.

Petitioners' new position is unpersuasive and without legal support. It was recognized by this Court shortly after the statutes were enacted that the Agricultural Entry Act and the 1920 Mineral Leasing Act were "to be read together – each as a complement of the other." *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 504 (1928). As the Court of Appeals likewise observed, the most rational interpretation is that Congress intended the word "gas" to mean the same thing in the Agricultural Entry Act and in other contemporaneous statutes relating to the management and disposition of minerals underlying the public lands. Pet. App. 22a-23a n.13. Petitioners offer nothing to refute this reasoning or to justify their change in position other than to state flatly, and without analysis, that they "strongly doubt" *in pari materia* is appropriate. Pet. 22. Merely stating that petitioners disagree with the Court of Appeals, however strongly, falls short of demonstrating that the court erred in a manner so egregious as to make exercise of this Court's supervisory powers necessary.

D. Petitioners' "Retroactive Deference" Argument Yields Unworkable Results.

Under petitioners' "retroactive deference" theory, no weight may be given by the courts to a long-standing agency interpretation when it is being applied by the Department for the first time to a new set of circumstances. The trick for petitioners, of course, is to define

"interpretation" as narrowly as possible so that a consistent agency pattern of long-standing is reduced to a series of fact-specific, isolated and unrelated events. For example, if years ago the Department had specifically interpreted reservations of gas under the Agricultural Entry Act to include helium,[10] petitioners would still be free under their theory to argue that deference by the court to the Department's interpretation in *Lanier* is nonetheless "retroactive" because *Lanier* involves carbon dioxide, not helium. The potential for mischief and manipulation from petitioners' "retroactive deference" theory is obvious.

In deferring to the Department in *Lanier*, the Court of Appeals was mindful of the fact that a long-standing and consistent agency interpretation of "gas" *specific to the Agricultural Entry Act* was lacking, and the court expressly took that fact into account before concluding that deference to the Department's more general long-standing interpretation was appropriate. Pet. App. 29a.

To grant petitioners the requested writ, this Court must be persuaded that the general view of agency interpretation employed by the Court of Appeals in this case constitutes a departure from the accepted and usual course of judicial proceedings so extreme as to require this Court's supervision. Such a conclusion would be unfounded, and petitioners' request must therefore be denied.

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[10] It should be noted in this connection that a broad construction of the word "oil" as used in the Agricultural Entry Act was upheld over 20 years ago in *Brennan v. Udall*, 251 F. Supp. 12 (D. Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir. 1967), *cert. denied*, 389 U.S. 975 (1967).

II. THE OPINION OF THE COURT OF APPEALS DEMONSTRATES THAT THE DEPARTMENT'S INTERPRETATION OF "GAS" IS NOT ONLY A REASONABLE INTERPRETATION, BUT THE "CORRECT" INTERPRETATION.

The Court of Appeals rejected petitioners' "purity test" stating that a rule that makes property rights to gas dependent upon the ratio of hydrocarbon to non-hydrocarbon gases would not aid in the rational development of the law of mineral resource rights. Pet. App. 33a-34a. Thus, the Court of Appeals did not see any middle ground: either carbon dioxide gas was reserved or it was not. Only one outcome could be "correct", if possible, and the Court of Appeals' opinion leaves no doubt that the Department's interpretation is the "correct" interpretation.

The evidence is overwhelming. The Court of Appeals rejected each and every argument made by petitioners in support of their interpretation. Most telling, however, is the court's conclusion that the word "gas" in the Agricultural Entry Act should be read *in pari materia* with the word "gas" in Section 181 of the 1920 Mineral Leasing Act. The court also expressly concluded that "the *most* rational reading [of the Agricultural Entry Act, the 1920 Mineral Leasing Act and a 1922 statute relating to mineral reservations in Alaska patents] is that Congress intended 'gas' to mean the same thing in all three statutes." (Emphasis added.) Pet. App. 22a-23a n.13. These conclusions, coupled with the court's conclusion that the word "gas" as used in the 1920 Mineral Leasing Act includes both combustible and noncombustible gas, can only yield one result – the "correct" interpretation is that "gas" in

the Agricultural Entry Act is a word broad enough to include combustible and noncombustible gases alike.

The Court of Appeals' treatment of the specific arguments made by petitioners is also telling. For example, in response to petitioners' argument that carbon dioxide gas was not one of the minerals for which petitioners' lands were withdrawn or classified as valuable (an argument petitioners resurrect at Pet. 15-16), the court not only rejects petitioners' reasoning, but goes on to observe that the oil and gas permits and other facts on which petitioners rely actually support the Department's interpretation of gas. Pet. App. 17a n.11. Similarly, in response to the arguments made by petitioners from legislative and historical materials, the court again observed that, if anything, a generic construction of the word "gas" is favored. Pet. App. 23a.

The Court of Appeals also concluded that petitioners' arguments failed to give proper weight to Congress's general intent to provide a statutory framework for the rational disposition of mineral resources. In this respect, the court reasoned, due regard must also be given to the analyses employed by courts resolving similar issues in the private mineral-conveyancing context. Pet. App. 31a-32a. The cases then cited by the court, *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 951 (1971) and *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966), both held that, absent express language to the contrary, "gas" used in the conveyancing context is broad enough to include hydrocarbon and nonhydrocarbon gas alike.

Given the Court of Appeals' conclusion that *in pari materia* construction with the 1920 Mineral Leasing Act is proper and that the analyses applied in *Northern Natural Gas* and *Navajo Tribe* are applicable, and given that each and every argument raised by petitioners failed to survive the court's careful scrutiny, it is obvious that the Court of Appeals favors the Department's interpretation of "gas" as a word broad enough to include carbon dioxide gas. If any doubt remains, however, the Court of Appeals ended by stating that petitioners' interpretation "strains credulity" (Pet. App. 35a) and that a construction contrary to the Department's "would undermine the fuel conservation purpose of the 1914 Act". Pet. App. 34a.

Finally, even if the Court of Appeals thought petitioners' interpretation of "gas" to be as reasonable and workable as the Department's (which it clearly did not), the court would have reached the same result nonetheless by applying the general rule that land grants are to be construed favorably to the United States. *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59-60 (1983).

III. PETITIONERS' OTHER CRITICISMS OF THE COURT OF APPEALS' OPINION ARE WITHOUT MERIT AND DO NOT DEMONSTRATE THE NEED FOR SUPREME COURT REVIEW.

After presenting their "retroactive deference" argument, petitioners attempt to resurrect several other arguments, each of which was thoroughly analyzed and then rejected by the Court of Appeals. Petitioners fail to demonstrate that in rejecting those arguments, the Court of Appeals strayed so far from the accepted and usual

course of judicial proceedings as to make supervision by this Court necessary.

A. Petitioners Demonstrate No Error in the Court of Appeals' Conclusion That Petitioners' Lands Were Not Withdrawn or Classified as Valuable for Petroleum.

Petitioners argued before the Court of Appeals that their lands were withdrawn from homestead entry because they were determined to be valuable for petroleum. Consequently, argued petitioners, only petroleum and gas associated with petroleum could have been reserved to the government when the patents were ultimately issued. Pet. 10th Cir. Opening Brief 18-20.

The Court of Appeals rejected this argument on several bases, one being that the administrative record does not support petitioners' basic premise that their lands had been withdrawn or classified as valuable for "petroleum".[11] To the contrary, it appears from the administrative record that petitioners' lands were withdrawn or classified as valuable for *oil and gas* because *oil and gas* prospecting permits covering the land had been issued by the Department. Moreover, those prospecting permits appear to have been issued under the 1920 Mineral Leasing Act, further supporting the Department's interpretation of "gas" and the court's conclusion that the

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[11] Another basis is that carbon dioxide gas and other nonhydrocarbon gases are, in fact, commonly found and produced in association with petroleum while, on the other hand, hydrocarbon gases are often produced from strata containing no petroleum. Pet App. 19a n.12.

Agricultural Entry Act and the 1920 Mineral Leasing Act must be read together in determining the scope of the word. Pet. App. 17a-18a. Petitioners' failure to build an administrative record sufficient to persuade the Court of Appeals that their lands had, in fact, been withdrawn or classified as valuable specifically for petroleum and petroleum *only*, does not constitute reversible error on the part of the court.[12]

B. Petitioners Demonstrate No Error in the Court of Appeals' Conclusion That Petitioners' *Ejusdem Generis* Argument Is Not Determinative.

Finally, petitioners contend that the Court of Appeals committed reversible error by concluding that the order in which (1) phosphate, (2) nitrate, (3) potash, (4) oil, (5) gas, and (6) asphaltic minerals are listed in the Agricultural Entry Act does not compel a construction limiting the word "gas" to mean fuel gas only. Pet. 17-20. The Court of Appeals analyzed petitioners' *ejusdem generis* argument carefully (Pet. App. 14a-16a) and found that it suffered from two major weaknesses.

First, the court observed that even if the structural argument advanced by petitioners were plausible,[13] other

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[12] Having failed to prove that their lands were the subject of petroleum-only withdrawals, petitioners now characterize this unsuccessful assertion as a "long-standing concession" on petitioners' part. Pet. 16. Surely petitioners "concede" too much.

[13] Although the Court of Appeals noted that petitioners' construction, if correct, would constitute overwhelming

(Continued on following page)

constructions are also plausible – while the six enumerated substances could be divided into the two groups of fertilizer minerals and fuel minerals, they could also be grouped together as nonmetalliferous minerals or read as six separate "classes" of minerals. Petitioners contend that a single grouping of nonmetalliferous minerals could not have been intended because the list does not exhaust the entire universe of nonmetalliferous minerals. Certainly the list does not exhaust the entire universe of fuel and fertilizer minerals either, but the significance of that observation is elusive, at best. Petitioners also deny that the list can be read to enumerate six separate substances of equal status. Why petitioners find this construction implausible is not clear, but this same lack of clarity highlights petitioners' failure to demonstrate that further review by this Court is required.

The second reason the Court of Appeals found petitioners' *ejusdem generis* argument less than compelling goes to the reliability of *ejusdem generis* as the sole indicator of Congress's intent. The court noted the manipulability of the rule and noted the fact that it was rejected as a rule of construction in the analogous case of *Northern Natural Gas, supra*. The court then asked the obvious

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(Continued from previous page)

evidence that "gas" was intended to *include* fuel gas, the court was not persuaded that this construction would *exclude* the noncombustible gases. Pet. App. 14a. Moreover, the court observed that petitioners' construction is undermined by *Brennan v. Udall, supra*, which held that "oil" as used in the Agricultural Entry Act is a term broad enough to encompass oil shale, a solid rock containing kerogen, but no petroleum. Pet. App. 15a n.9.

question why Congress did not simply refer to "fuel gas" in the statute rather than rely on the rule to limit the scope of the word "gas". Petitioners do not address this second criticism of their *ejusdem generis* argument, and their silence again highlights petitioners' failure to demonstrate why additional review by this Court is necessary.

CONCLUSION

Petitioners fail to demonstrate that the Tenth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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APPENDIX A
BLM DECISION

(SEAL)

IN REPLY REFER TO

CO-943A(RD/WN)

C-39463

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
COLORADO STATE OFFICE
2020 ARAPAHOE STREET
DENVER, COLORADO 80205

Certified Mail

Recordable
Disclaimer
of Interest

DEC 17 1984

DECISION

Mr. Robert D. Lanier, *et al.*
c/o Stephen H. Muse, Esq.
Du Terroil, Muse & Shackleford
6122 Royal Creek
San Antonio, Texas 78239

Claim for Carbon Dioxide Mineral Rights
(The McElmo Dome) Considered as an Application
for a Recordable Disclaimer of Interest in Lands
APPLICATION DENIED
Request to Place Funds in Escrow Rejected

On January 9, 1984, Stephen H. Muse, Esq., on behalf of several alleged landowners within Dolores and Montezuma Counties, Colorado, presented to this office a claim that his clients own the carbon dioxide [hereafter CO_2] underlying their lands, particularly the CO_2 found in the Mississippian Leadville Formation within the McElmo Dome (Leadville) Unit[1] area, rather than the United States of America, which has for years, both

before and after the applicable patents were issued, been leasing the lands for oil and gas, including any CO_2 that may be in such lands, pursuant to the Mineral Lands Leasing Act of February 25, 1920 [41 Stat. 437], as amended, 30 U.S.C. §§ 181 *et seq.* (1982) [hereafter, MLLA].

GENERAL DESCRIPTION OF THE CLAIM FOR CO_2 RIGHTS

The original claim has been supplemented by supporting documentation filed on March 15, April 2, and May 7, 1984. The claimants seek through this material to have the Department of the Interior, acting through this office of the Bureau, declare that the claimants, whose title presumably derives from patents excepting and reserving oil and gas to the United States under the terms of the Act of July 17, 1914 [38 Stat. 509], as amended, 30 U.S.C. § 121 (1982) [hereafter the 1914 Act], are the true owners of the CO_2 underlying their lands, rather than the United States of America or its lessees.

The original list of the claimants and the lands subject to the claim, contained in the documents filed on January 9, 1984, was replaced by a revised list received on July 2, 1984. Additions to the revised list were received in this office on October 3 and 11, 1984, and a slight correction to the claimed land description for one claimant was received October 4, 1984.[2]

As the claim now stands, the claimants request that this office determine and declare that they are the owners of the CO_2 under 20,931.43 acres lying within 14 townships in Southwest Colorado either within or in close proximity

to the McElmo Dome (Leadville) Unit Agreement area.[3] Our records disclose that 20,043.39 of the acres embraced by the claim were patented by the United States under the homestead laws, excepting and reserving the oil and gas to the United States pursuant to the 1914 Act.[4]

Within the boundaries of the McElmo Dome (Leadville) Unit area, 15,990.05 acres are subject to the claim. Of that total, 15,742.01 were patented subject to a reservation of oil and gas pursuant to the 1914 Act. A review of the status plats maintained by our office shows that within the McElmo Dome (Leadville) Unit area, approximately 24,629.44 acres were patented subject to such a reservation of oil and gas. Thus, about 8,887.43 acres within the unit area are patented subject to the reservation of oil and gas under the terms of the 1914 Act, but are not included within the pending claim, although some of this acreage was contained on the original list of lands and claimants filed January 9, 1984.

Further review of the land status reveals that within a square of the 25 townships, from 36 to 40 North, Ranges 16 to 20 West, New Mexico Principal Meridian, where all of the present claimed land is located, about 46,614.47 acres were patented subject to an oil and gas reservation pursuant to the 1914 Act. Within this larger area, a total of approximately 26,571.08 acres would thus be subject to similar claims.[5]

The basic thrust of the claimants' presentation to this office is that their patents should be considered to convey to the original patentees the title to the CO_2 in their lands because Congress intended that the reservation encompass only "hydrocarbon" or "fuel" gases, rather than *any*

substance that might be considered a "gas." A voluminous amount of material, much bolstering the contention that CO_2 should not be considered a "gas" reserved pursuant to the 1914 Act, has been received from the claimants.

DETERMINATION OF THE OWNERSHIP OF THE CARBON DIOXIDE

After reviewing this material, however, and considering the enclosed advice from the Regional Solicitor,[6] who also considered all of the material submitted on behalf of the claimants dealing with the legal issue of CO_2 ownership, this office concludes that the United States holds all the right, title, and interest to any and all CO_2 within those lands in Colorado embraced by homestead patents which contain the following or any similar clause:

> Excepting and reserving, also, to the United States all oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 [38 Stat. 509].

Where, of course, the exception and reservation cover less than all of the lands in a particular patent, this determination of ownership affects only to that portion of the lands embraced by the exception and reservation.

CLAIM AS APPLICATION FOR DISCLAIMER OF INTEREST IN LAND

Procedurally, this office considers the claim to be an application to the United States to issue to the claimants a

recordable disclaimer of any interest to the CO_2 in the lands subject to the claims pursuant to Section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA) [90 Stat. 2770], 43 U.S.C. § 1745 (1982).

This application has been serialized with our serial number C-39463. All future correspondence and appeal material, if any, concerning this case should refer to C-39463 to permit expeditious processing. To the extent the claim includes lands subject to a patent reserving the oil and gas pursuant to the 1914 Act, the application for a recordable disclaimer of interest in the CO_2 in the claimed lands is denied.

This office has treated the claim as a single consolidated application of several claimants. In fact, the material presented amounts to about 140 separate applications. In the event the claimants eventually prevail and this office or the Department is ordered to issue disclaimers of interest in the CO_2 in the claimants' lands, the claimants will be expected to comply with all the requirements of the recently issued regulations in 43 CFR, Subpart 1864, appearing at 49 FR 35296, September 6, 1984, implementing Section 315 of FLPMA.

Each claimant or set of claimants would be expected to submit a filing fee of $100 for each portion of land within a single patent and demonstrate their title to the CO_2 by tracing their ownership from the original patentee. Additionally, the claimants will, if successful, be required to reimburse the Bureau for such processing costs as are required by the new regulations. This may possibly include costs incurred by this office on and after the effective date of the new regulations, October 9, 1984, if

this decision is eventually reversed and this office is ordered to issue disclaimers to the claimants. This office will review that cost issue only if this decision is overturned.

This office is not insisting on the requisite filing fee or processing costs for this consolidated claim as the bulk of the work relating to the present claim (application for disclaimer) was completed prior to the effective date of the new regulations at 43 CFR § 1864.1-2. All of such work should have been so accomplished but for the press of some other priorities.[7] In view of our determination that the claimants are not entitled to disclaimers of interest to the CO_2 in any event, requiring proof of the chain of title is unnecessary.

This office has been generous in allowing the substitution and addition of parties within the application. However, with the issuance of this decision, and considering the recent issuance of regulations implementing Section 315 of FLPMA, this office will not permit further additions to the lands or the claimants. Whether the Interior Board of Land Appeals will permit additions or modifications is, of course, within the discretion of that Board.

Unless otherwise ordered, however, this office will consider that any new potential applicant or lands not appearing on the list submitted July 2, 1984, as revised, must be processed separately pursuant to the recently promulgated regulations for any adjudication of CO_2 ownership. A failure to file any application for disclaimer promptly may subject the applicant to some of the procedural defenses such as laches or statute of limitations indicated later in this decision.

SPECIAL STATUS PROBLEMS WITH PORTIONS OF THE CLAIM

Four portions of the claim present unusual problems as our records indicate that the United States either does not now hold any title to the oil and gas in the lands encompassed by that portion of the claim or has never issued any patent to the land. As to one portion, the United States has previously passed any title to the minerals to the State of Colorado.[8] In another part of the claim, a small portion of the acreage includes lands where the United States patented the land without any mineral reservation.[9] A third portion of the claim encompasses lands where our records fail to indicate that any patent has ever been issued.[10] In the fourth portion with status problems, the United States did not reserve any minerals in the lands apparently claimed.[11] For the reasons set out in more detail in the footnotes, the claim is also rejected as to those lands although particular applications to issue a disclaimer of interest in the oil and gas, rather than the CO_2 alone, to proper parties may be entertained.

A fifth portion of the claim is contained in a patent which purports to reserve all coal and other minerals pursuant to the Stock Raising Homestead Act as well as oil and gas under the 1914 Act.[12] For reasons set forth in the footnote, we are treating that portion of the claim as being the same as other lands which are patented subject to the 1914 Act.

REASONS FOR REJECTION OF THE CLAIM/DENIAL OF THE APPLICATION

This office rejects the claim based primarily upon the reasoning indicated in the enclosed Opinion from the

Regional Solicitor, Rocky Mountain Region. A related Opinion from the Office of the Solicitor, Washington, D.C., issued a few days prior to the advice rendered on the claim itself, bolsters the authority of a brief earlier Opinion rendered by the Regional Solicitor to the effect that the United States holds the title to CO_2 where lands have been patented with a reservation of oil and gas pursuant to the 1914 Act, by partially relying upon the older Opinion to decide that the MLLA is the proper authority for issuing pipelines to carry CO_2.[13] The two 1984 Opinions were apparently written independently of each other to respond to different officials of this Bureau, but both provide authority for our conclusion that the United States owns the disputed CO_2, as does the earlier 1979 Opinion.

Given the tenuous nature of the basis for the claimants' or applicants' assertions, there is, we feel, an additional reason to reject the claim or application. If the doubts in this case were more evenly balanced, the administrative consequences of a determination in favor of the applicants should be of little concern. We perceive the claim to be extremely weak, however, and the severe administrative consequences that would follow a determination that the claim is valid further justify its rejection.

The Department of the Interior, normally acting through the Bureau of Land Management and its predecessor agency, the General Land Office, has for at least 40 years considered all oil and gas leases issued under the MLLA to convey to the lessee the right to develop all substances considered to be gases, with the exception of helium. Helium is specifically excluded from oil and gas leases as a result of the Act of August 8, 1946 [60 Stat. 950],

amending the MLLA, 30 U.S.C. § 181 (1982). No effort has been made, nor real thought given, to insuring that oil and gas leases be limited to specific types of land. Leases commonly embrace both patented lands where minerals have been reserved under one or more different acts and lands where the full fee title resides in the United States of America.

While leases have been restricted to include only either public domain or acquired minerals because there are distinct leasing laws for each type,[14] leases have never been delineated based upon surface ownership or the nature of the patent embracing particular lands. In short, reserved oil and gas have been treated, for the purposes of issuing and administering leases, as part of the original public domain mineral estate of the United States and no distinction made as to the basic rights of the lessee based upon the surface ownership, although the lessee may have differing obligations to the surface owners under the terms of various laws.

A determination at this late date that the United States is not vested with full title to all gases in the general oil and gas estate that it has so long considered to be part of the public domain would create chaos in the leasing process wherever lands patented, subject to the provisions of the 1914 or any similar act reserving oil and gas, exist. Serious questions would be raised as to the validity of such leases, especially where the lease has been extended by virtue of production of CO_2, whether such production stems from the land subject to the 1914 Act or some other portion of the leasehold. A ruling that the United States does not own the CO_2 in such lands would certainly complicate the issuance and administration of oil and gas

leases by the United States in order to avoid leases where the fundamental substances subject to the lease might vary in different parts of the leasehold. Absent a clear, positive basis for a determination that the landowner is the owner of the CO_2, the resulting complications should weigh in favor of ownership by the United States of America.

The foregoing hint of concerns is less than exhaustive.[15] Many claims and counterclaims may be generated should the claimants' basic contention eventually be determined valid, whether or not the United States itself is liable for any damages. While the present claim may not be strictly subject to the Act of October 25, 1972 [86 Stat. 1176], 28 U.S.C. § 2409a (1982), the nature of the problems that will be encountered seems to be at the heart of the twelve year statute of limitations in the law providing for quieting title to real property. Congress, no doubt, foresaw such complications arising from a failure timely to assert one's title. In the present case, however, this office is in no manner determining whether there may be any statutory or other legal bar to recognizing all or any part of the claim as valid; in view of our determination on the merits, no such review is necessary. We think, however, that all of these concerns are important in balancing the doubts that exist in this case. They should be of little weight if there were substantial doubt of the title of the United States to the CO_2. However, this office has concluded that the claim has little, if any, validity and these potential future problems are more than sufficient to erase any doubt favoring the claimants or applicants.

REQUEST FOR ESCROW OF FUNDS

As part of the claim presented on January 9, 1984, the claimants request "an accounting of all monies received from royalties, bonuses, lease payments, etc., received by the government and attributable to [the claimants'] lands" and demand "that all future royalties, payments, etc., of whatsoever kind and nature, received by the government on account of the [CO_2] in [the claimants'] lands be handled in accordance with the provisions of Section 28 'Loss of Title', of the Unit Agreement . . . " The request and demand are denied for the following reasons:

1. As we have determined that the claim is not meritorious, escrowing any funds will certainly delay the benefit of such funds to the General Treasury, the State of Colorado and other funds that are the beneficiaries of such revenues. Such a delay cannot be justified by the slight possibility that such revenues may later have to be accounted for to the claimants.

2. The escrowing provision in Section 28 of the Unit Agreement envisions situations where the validity of a particular lease interest is in doubt, not the fundamental title of the United States. Section 28's third paragraph acknowledges the potential dispute between some landowners and the United States about the ownership of the CO_2 but does not require the United States to escrow or suspend funds for the claimants or any other potential claimant.[16]

3. Even if the claimants are entitled to be considered the owners of the CO_2 in the lands in the claim, it is doubtful that they would be entitled to any of the royalties from the production because of the State involvement with the

unitization that effectively forcepools all private mineral interests in the Unit.[17]

4. Sorting out what portion of the revenues may be attributable to CO_2 would be particularly difficult where some of the leases covering the lands are producing oil and other gases. The leases in a purely rental status are presumably valid for oil and most gases, and should the claimants eventually prevail, it would be inappropriate to deprive the United States and the State of Colorado of that type of revenue, even though the lessees and other interested parties may have lesser rights than they envisioned.

5. As has been indicated earlier, should the claimants be determined to be the actual owners of the CO_2 in the lands covered by the claims, the very validity of the United States leases as to the claimants' lands would be questionable. The lessees and other deriving rights from such lessees would seem just as, if not more, entitled to the revenues that the claimants desire to have turned over to them. To the extent such lessees and other parties have removed CO_2 from the claimants' lands, they would seem equitably entitled to some compensation from the United States to help offset possible liability to any claimant or other parties for trespass removal of the CO_2.

6. In the unlikely event that the claimants eventually prevail, United States revenues from other portions of the McElmo Dome (Leadville) Unit should be sufficient to allow an equitable offset to permit payment of appropriate improperly collected revenues to the parties, if any, entitled to them. While the claimants may be entitled to a

large amount of compensation, should they be determined to own the CO_2, it is uncertain that the United States will be responsible for all or any part of such possible damages. Determination of such damages and the parties, if any, responsible for them, should await the unlikely event of the claimants' prevailing on the basic issue in this decision. Presumably the full faith and credit of the United States will be available to remedy damages for which it is determined to be liable. Although the damages may well be considerable, they are unlikely to be significant in comparison to the total revenues of the United States.

Accordingly, no action will be taken by this office to account for or cause the Department to hold in suspense or escrow revenues attributable to CO_2 in the claimed lands.

ADVERSE PARTIES

Should the claimants choose to appeal this decision to the Interior Board of Land Appeals, this office considers it appropriate that all of the lessees and holders of operating rights (commonly collectively called working interest owners, except for lessees without any operating rights) be treated as adverse parties. Additionally, parties with a likelihood of acquiring leases or interests in such leases in the near future as a result of bids, applications, or assignments should be treated as adverse. As the State of Colorado and some of its local governmental entities stand to lose their shares of the revenue received by the United States from the leases covering the claimants' lands and thus may also be adversely affected should the claimants

eventually prevail, this office is also naming the State of Colorado as an adverse party.

This would require service on such parties of any notice of appeal or appellate documents such as briefs, etc., and filing proof of such service with the Board of Land Appeals (not with this office). Whether any adverse party elects to participate in any appeal before the Board of Land Appeals is discretionary with that party. For purposes of the claimants' lands which lie within the McElmo Dome Unit Agreement, the only adverse parties that this office considers necessary to serve are the State of Colorado and the McElmo Dome Unit Operator, Shell Western E&P Inc. The unit operator is responsible for the interests of all Federal working interest owners within the unit area, and for purposes of this case may be considered their agent. Any effort by this office to delineate the identity of each working interest owner within the unit, even limited to those with interests in leases embraced by the claimants' lands, would generate unnecessary delay. Many, but not all, of those parties are the same as have been identified as adverse parties who must be served because of their interests in leases outside the unit area.

Service on the State of Colorado should be directed to the following, unless the State hereafter specifies another party for service:

Attorney General
State of Colorado
1525 Sherman Street
Denver, CO 80203

To the extent any appeal is taken as to any land claimed within the McElmo Dome (Leadville) Unit Area, the following party must be treated as adverse:

Shell Western E&P Inc.
P.O. Box 576
Houston, TX 77001

For those lands outside the McElmo Dome Unit Area, this office has identified as adverse parties at least 50 individuals and companies whose interests could be severely affected, if not destroyed, should the claimants prevail on their basic contention. These parties are identified on Enclosure 6 to this decision. Their interests are more fully spelled out on Enclosure 7 which identifies the nature of the party's interest in a particular lease and whether it covers the particularly described lands. In the event of an appeal, all of these parties must be served, except to the extent that any particular lands are excluded from the appeal and such exclusion has the effect of removing entirely the indicated lease from Enclosure 7.[18] This office is mailing a copy of this decision and its enclosures to each of the parties named on Enclosure 6, as well as the State of Colorado and Shell Western E&P Inc.

Unless this office is subsequently restrained by appropriate orders, routine adjudication of applications and assignments affecting the lands and leases covered by this decision will continue normally. To refrain from the processing of the assignments, as well as future assignments that can reasonably be anticipated to be executed and filed for approval, will generate an unnecessary backlog of such actions. As this office becomes cognizant of any additional parties that could be considered adverse, as a result of the *approval* of an assignment, this

office will notify both Stephen H. Muse, Esq., or any successor(s) to him and the potential adverse party of this decision and any pending appellate action of which this office is aware.

RELATIONSHIP OF THIS DECISION TO PRIOR COURT PROCEEDINGS

This decision is considered to be an initial administrative decision of the Bureau of Land Management of the type envisioned by Judge John L. Kane, Jr., in dismissing the case of *Dean Ives, et al. v. United States of America, et al.*, on March 25, 1981 in Civil Action 80-K-705, U.S.D.C. (D. Colo.). While that decision may have specifically contemplated a hearing as a result of a private contest and an administrative law judge's decision subject to an appeal to the Interior Board of Land Appeals, this office considers this decision to be of a comparable nature and to allow the plaintiffs in that court action to pursue their claim at the appropriate last administrative level within this Department. This decision may be appealed to the Interior Board of Land Appeals.

RESERVATION OF POTENTIAL PROCEDURAL DEFENSES

This decision has been directly concerned with the merits of the claimants' contention that they, as the current landowner, rather than the United States, hold the fundamental title to the CO_2 on their lands. This decision should not be construed as any waiver by the United States later to claim such procedural defenses as res judicata, laches, estoppel, or the statute of limitations against the basic contentions of the claimants or any of them.[19]

RIGHT TO APPEAL THIS DECISION

This decision becomes final 30 days from its receipt by Stephen H. Muse, Esq., or his representative, unless it is appealed pursuant to 43 CFR, Part 4, Sub-part E. See the enclosed Appeal Information Sheet (CSO 1840-3, October 1984).

/s/ Kannon Richards
Kannon Richards
State Director

Enclosures (8)
1-List of Claimants and Claimed Land (9 pages)
2-Chart Showing Affected Acreage (1 page)
3-Solicitor's Opinion, July 26, 1984 (10 pages)
4-Solicitor's Opinion, July 20, 1984 (8 pages)
5-Solicitor's Opinion, July 12, 1979 (3 pages)
6-List of Adverse Parties (2 pages)
7-Chart of Adverse Parties' Interests (13 pages)
8-Appeal Information Sheet (2 pages)

cc: Attorney General, State of Colorado
Shell Western E&P Inc.
Parties Named on Enclosure 6

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[1] The McElmo Dome (Leadville) Unit is a producing oil and gas unit formed under the authority of the MLLA, and approved by this office under the provisions of 43 CFR, Subpart 3180 (1983). The primary purpose of this unit is to extract the CO_2 from the Mississippian Leadville Formation underlying the unitized lands to be transported by pipeline to oil fields in Texas for injection to aid recovery of the remaining reserves. The unit embraces approximately 203,234.26 acres in Dolores and Montezuma Counties in Southwest Colorado. More than three-quarters of the land, approximately 154,638.98 acres, contains Federal oil and gas according to our records and nearly all of those lands, including all of that portion of the lands claimed by Mr. Muse's clients lying within the unit area, are

embraced in existing oil and gas leases issued by this office or the Department.

One major thrust of the claim is that the CO_2 in 15,990.05 acres within the unit, where this office has long considered the CO_2 to be part of the mineral estate of the United States, instead belongs to the claimants. The unit currently embraces approximately 242 Federal oil and gas leases including at least 115 leases containing some lands covered by the claim.

CO_2 was discovered within the boundaries of what is now the McElmo Dome (Leadville) Unit about 1950 on Federal lease Pueblo 058692 and production was apparently used for dry ice. Some older wells are not committed to the unit, as two portions of land within the southeast quadrant of the unit have been excluded from the unitization. During the 1970's, Shell Oil Company and Mobil Oil Corporation formed seven exploratory units for development of anticipated CO_2 reserves in the area. As expanded, these successful exploratory units were the basis for the McElmo Dome (Leadville) Unit, which might also be considered a consolidation of the prior units into a single development unit.

[2] The revised list of claimants and the land claimed, as supplemented, can be found at Enclosure 1.

[3] All of the lands subject to the claim are within eight miles of the boundaries of the McElmo Dome (Leadville) Unit. Some portions of the claim, especially those in T. 38 N., R. 16 W., N.M.P.M., are quite isolated from the rest of the claim. Enclosure 2 makes the spread of the claim somewhat more apparent, as do plats and maps in the case file prepared by this office to display the lands subject to the claim as well as other lands in the vicinity that would be subject to similar claims. The claimed lands, as well as the lands patented subject to the oil and gas reservation under the 1914 Act, generally lie in the eastern and northern portions of the unit or in close vicinity to the northern edge of the unit.

[4] The discrepancy between the acreage claimed and the acreage subject to the oil and gas reservation authorized by the 1914 Act is more fully explained at footnotes 8 to 11.

[5] A detailed acreage breakdown of the claimed land and land potentially subject to similar claims, by township and

relationship to the McElmo Dome (Leadville) Unit, is found at Enclosure 2.

[6] Memorandum from the Regional Solicitor, Rocky Mountain Region, to the State Director, Bureau of Land Management, Colorado, Subject, "Ownership of Carbon Dioxide in Reservation of Oil and Gas to United States," July 20, 1984, Enclosure 3.

[7] A principal author of this decision was requested by name by the Bureau to participate in a week-long session in Washington, D.C., to review comments on oil and gas adjudication handbooks in September and was also required to spend several other workdays in working on particular handbooks dealing with bonding and assignments.

[8] This portion of the claim, that of Arthur and Esther Wilson, Marie R. Wilson, the S. Glenn Wilson Estate, and Barbara Burke for the Paul Wilson Estate, to All, Section 16, T. 38 N., R. 16 W., N.M.P.M., consists of a land to which all right, title and interest have passed from the United States to the State of Colorado pursuant to Section 7 of the Act of March 3, 1875, admitting the Territory of Colorado into the Union as a State. Since the United States has no apparent title to any minerals in this land, it would be extremely inappropriate to issue any current disclaimer of interest in the CO_2 to such lands and create a cloud of title where there is no showing that one now exists.

[9] This second portion of the claim, that of Russell D. Brown, Mildred Maggert, and H. L. Posey to Tract 40 in T. 37 N., R. 19 W., N.M.P.M., covers the lands patented as Lot 2 of Section 4 of that township. The patent to that lot did reserve the oil and gas to the United States pursuant to the 1914 Act. However, a resurvey of the lands conducted after the patent issued revealed that Tract 40 overlaps or conflicts with Tracts 71A and 71D on the west to the extent of approximately 7.95 acres. As Tracts 71A and 71D were patented prior to Tract 40, with no mineral reservation, the United States does not now claim title to the oil and gas, much less the CO_2, in the conflict area. Realizing that the overlap between the two patents may cloud title as to the oil and gas within the area of overlap, this office would certainly entertain an application for a recordable disclaimer of interest as to the oil and gas in the conflict area.

However, the present claim seeks to acquire clear title to CO_2 within all of Tract 40 rather than a limited portion thereof. As the claim embraces all of Tract 40, it must be denied.

[10] This part of the claim, that of Fred G. and Virginia Cline, as to what would normally be described as W 1/2 SW 1/4, Section 17, T. 37 N., R. 19 W., N.M.P.M., officially described as Tracts 60A and 60B of the same township, embraces lands that appear to be fully within the public domain, so far as our records disclose. No patent embraces such lands. A homestead entry was once made for such lands, but was later closed without any patent issuance. Since the United States is the full fee owner of these lands, a disclaimer of any interest in the CO_2 would be most inappropriate and will not be issued.

[11] This part of the claim, that of Ursel and Louise Pribble to the NE 1/4 of Section 1, T. 38 N., R. 19 W., N.M.P.M., appears to cover Lots 5, 6, 11 and 12 of Tract 37 in that township. Those lands were patented with no mineral reservation to the United States. As it appears that the United States has no mineral interest in such lands, and this office can discern no cloud on the title to such lands, the claim is also denied as to these lands.

[12] This portion of the claim, that of Jerry Huskey, Pat Huskey and Gary Huskey to the SE 1/4 NE 1/4, the N 1/2 SE 1/4, and the SE 1/4 SE 1/4 of Section 8, T. 39 N., R. 19 W., N.M.P.M., is embraced by a patent apparently reserving to the United States all coal and other minerals in the lands subject to the Act of December 29, 1916 (Stock Raising Homestead Act) [38 Stat. 862], 43 U.S.C. §§ 291-302 (1982), repealed by Section 702 of FLPMA of 1976, except for Alaska, [90 Stat. 2787], as well as reserving all oil and gas under the 1914 Act. The duplicate nature of the reservation could raise some question as to what was reserved to the United States. A review of a copy of the Homestead Entry file for such lands discloses no basis for the "coal and other minerals" reservation and contains the entryman's consent to the reservation of oil and gas under the 1914 Act, indicating that the issuing office inadvertently used a patent form designed for Stock Raising Homestead Entries rather than the general Homestead Patent form that should have been used. Because of this apparent mistake,

this office is considering the claim as to these 160 acres (listed as 120 acres in the claim) to be the same as the vast bulk of the claim for purposes of rejection. The United States does reserve the right, however, in the event this decision is eventually found erroneous, to consider further whether the CO_2 in this portion of the claim belongs to the United States independently of the reservation under 1914 Act, *i.e.*, because of the apparent reservation under the Act of December 29, 1916.

[13] This Opinion, Enclosure 4, is a Memorandum from the Associate Solicitor, Energy and Resources, to the Director, Bureau of Land Management, Subject, "Authority for Carbon Dioxide Pipeline Rights-of-Way," dated July 20, 1984. The earlier Opinion, Enclosure 5, is more precisely a Memorandum from the Regional Solicitor, Rocky Mountain Region, to the State Director, Colorado, subject, "Reservation of Carbon Dioxide in Land Patent," dated July 12, 1979. The 1979 Opinion, which was more in the nature of informal advice to this office, was attacked in a lawsuit brought by several of the present applicants in 1980. The action was pursued in Federal District Court in Colorado but was eventually dismissed, in part at least, because of the claimants' failure to pursue appropriate administrative remedies within the Department. This decision constitutes an initial administrative decision by the Department concerning the claimants' basic contention that they own the CO_2 in certain lands. Further review is available within the Department as explained later in this decision. See Order of Dismissal, *Dean Ives, et al. v. United States of America, et al.*, Civil Action No. 80-K-705, U.S.D.C. (D. Colo.), March 25, 1981.

[14] The MLLA or the Acquired Lands Leasing Act of August 7, 1947 [38 Stat. 741], 30 U.S.C. §§ 351 *et seq.* (1982).

[15] Within the McElmo Dome Unit area, many of the leases or the claimed land have been extended by virtue of unit drilling in an effort to discover more CO_2 or by production of CO_2 on unitized lands, either as part of the McElmo Dome Unit or one of the several units that the McElmo Dome Unit replaced. If a lease containing both 1914 Act lands and unpatented lands or lands patented subject to the Stock Raising Homestead Entry Act was extended by drilling for or production of CO_2, would that portion of the lease covering 1914 Act lands expire at the end of the lease's primary term? Would

production of CO_2 from 1914 Act lands serve to validate the lease as to the other lands, even though there was no production from such other lands and even if the lessor does not own the basic title to the produced CO_2; *i.e.*, that produced from the 1914 Act lands?

This office foresees an extremely complicated review of all leases within the McElmo Dome Unit should a determination be made that the United States does not own the fundamental title to the CO_2 in the claimants' lands. If all or parts of leases are subsequently determined to have expired at an earlier time than to which rentals or royalties have been paid, complicated questions will arise as to disposition of the revenues collected erroneously and the liability of the United States and other governmental agencies benefiting from those monies. While statutes of limitations may dispose of some problems, payment of actual royalty revenues from the claimants' lands has only recently commenced.

The claimants' demand for an accounting, dealt with later in this decision, appears to be less than complete by assuming that only the revenues and bonuses collected by the United States are due to the claimants; if those bonuses and revenues were erroneously collected by the United States, they could just as logically be refunded to the parties paying them, and those parties, possibly together with the United States, might be liable in some manner to the claimants or other rightful owners of the CO_2 involved. The accounting for all revenues, should the claimants or others be determined to own the CO_2, will be further complicated by the State of Colorado Oil and Gas Commission Order approving the unitization and effectively forcepooling all private CO_2 interests in the unit area, at least as to the unitized formation.

Even the validity of the Commission's Order may be subject to question, should the United States not hold the basic title to the CO_2 in over 24,000 acres of the 203,234.26 acre McElmo Dome Unit. The Commission's Order was based upon the Unit Proponents' Certification that over 88 percent of the working interest ownership was committed to the agreement. If the percentage attributable to the leases covering 1914 Act lands within the unit area were subtracted, the Commission

may have not approved the unitization. The Commission's Order was also the primary basis upon which this Office approved the Unit Agreement, rather than the customary method of insuring that a requisite percentage of working interest owners voluntarily consented to the unitization for purposes of MLLA.

[16] The wording of Section 28 of the McElmo Dome (Leadville) Unit Agreement conforms, as to the first two paragraphs thereof, to Section 27 of the standard exploratory unit agreement found at 43 CFR § 3186.1 (1983). This language is designed to deal with situations where the working interest ownership of a Federal lease or the validity of a particular Federal lease is brought into question; it does not contemplate a loss of title by the United States. The first paragraph requires continued payment to the United States of revenues attributable to a lease in question, including portions that may exceed that to which the United States may be entitled, pending resolution of the question. The last paragraph of Section 28 of the McElmo Dome (Leadville) Unit Agreement acknowledges the outstanding or potential claims of the present claimants and others, recognizing that there may have to be a future accounting, but does not in any manner require that those revenues attributable to the claimed lands must somehow be suspended from normal treatment.

Moreover, even if the section could be read as requiring a suspension or escrow of the funds attributable to the [sic] any of claimants' lands, this office has no proof that all or any of the claimants are party to the Unit Agreement and entitled to claim any benefit therefrom. Finally, any benefits from the Unit Agreement could not be extended to lands not within the unit agreement; more than 20 percent of the claimants' lands fall outside the unit area.

[17] As this office generally understands the Commission Order, unleased private lands within the unit area, unless voluntarily committed to the applicable unit operating agreement, will gain no benefit from any unit production attributable to the lands until the Unit Operator has at least recovered the costs of developing the unit; since production has only recently commenced, full cost recovery does not appear imminent.

[18] Thus, if Robert D. Lanier decided not to appeal as to S 1/2, Section 5, T. 38 N., R. 16 W., N.M.P.M. (Item No. 1 on Enclosure 7), Bruce Anderson need not be served as he has no interest in any other lands on Enclosure 7. However, a determination by Howard L. and Elsie Bartley not to appeal this decision as to the S 1/2 SE 1/4, Section 15, T. 40 N., R. 19 W., N.M.P.M. (Item No. 30), would not remove Tenneco Oil Company from the list of adverse parties, as it also appears in the claims of Glen C. and Lois Hudgeons and James D. Harris for Harris Limited Partnership (Items No. 21 and 32). Any such determination not to appeal may have the effect of barring the claimants and their heirs and successors forever from pursuing any claim to the title to the CO_2, however. This decision should not be construed as encouraging a failure to appeal because of the administrative complexity of this case.

[19] Page 5 of the Opinion of the Regional Solicitor directed to the instant claims, Enclosure 3, refers indirectly to the late nature of the claimants' assertions by noting that the claims appear to have arisen only after the CO_2 discovery in an unknown area. Additionally, one of the claimants, Hazel Neely, previously made an application for a transfer of the mineral interest in her lands to the Montrose District Office of this Bureau; the application was eventually denied for her failure to comply with some requirements relating to the application. Whether that action estops the claim, so far as Hazel Neely is concerned, or amounts to res judicata, has not been considered by this office in acting on the present claim so far as the lands allegedly held by Hazel J. Neely and Dee Renay Neely. No exhaustive review has been undertaken to see whether any of the other claimants may have presented similar applications of this nature. This decision should not be construed as waiving any right by the United States to conduct further research to determine whether all or any part of the claim or application may be faulty because of an earlier failure to pursue a related application.